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January 18, 2017

To Whom It May Concern:

Through this letter, Human Rights Watch (“HRW”) requests copies of documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

We request these documents on an expedited basis; we also seek a public interest fee waiver and news media fee status.

As explained below, our request concerns final or working policy and other documents that relate to the ability of the Marine Corps Intelligence Department to obtain access to communications and related data that the US government has acquired under 50 U.S.C. § 1881a (also known as Section 702 of the Foreign Intelligence Surveillance Act, “FISA”) or Executive Order 12333 (“EO 12333”). In the context of this request, “related data,” also commonly known as “metadata,” refers to data that describe a communication: for example, the date, time, and duration of a telephone conversation, or the date, time, sender, and recipients of an e-mail. For our purposes, “related data” also includes location data.

Below, we list our specific requests, followed by an explanation of the relevant laws. We also provide details regarding our requests for expedited processing, a public interest fee waiver, and news media fee status.

I. Requested records

Human Rights Watch respectfully requests copies of the following documents, preferably in electronic format and on a rolling basis as the Intelligence Department locates them:

1. Formal, final, or implemented legal opinions and determinations, procedures, policies, and training materials concerning the *acquisition or collection* of communications or related data under Section 702 or Executive Order 12333 by the Intelligence Department, including pursuant to a delegation of authority by the National Security Agency/Central Security Service (“NSA”).

- a. Please note that some materials may refer to Section 702 simply as the “FISA Amendments Act” (or “FAA”), of which it was a part.
2. Formal, final, or implemented legal opinions and determinations, procedures, policies, and training materials concerning the Intelligence Department’s *receipt, dissemination, retention, minimization, or querying* of communications or related data obtained under Section 702 or Executive Order 12333, insofar as these actions are (or were) part of efforts to prevent, detect, assess, investigate, or prosecute immigration- or drug-related activities, including outside of the United States.
 - a. This request includes (but is not limited to) the ability to obtain or view such data due to participation in fusion centers and joint task forces, and through databases to which the Intelligence Division has access.
3. Formal, final, or implemented legal opinions and determinations, procedures, policies, training materials, and memoranda of agreement (with appendices where applicable) concerning the Intelligence Department’s ability to request raw signals intelligence the NSA has acquired pursuant to Executive Order 12333.
4. Formal, final, or implemented legal opinions and determinations, procedures, policies, and training materials concerning the Intelligence Department’s treatment of communications and related data belonging to United States persons that has been acquired pursuant to Section 702 or Executive Order 12333.
5. Formal, final, or implemented legal opinions and determinations, policies, procedures, and training materials that concern any ability on the part of the Intelligence Department to nominate targets for communications surveillance under Section 702 or Executive Order 12333 to the NSA or Federal Bureau of Investigation (“FBI”).
6. Formal, final, or implemented legal opinions and determinations, policies, procedures, and training materials that concern the Intelligence Department’s treatment of attorney-client communications or related data that the US government originally obtained pursuant to Section 702 or Executive Order 12333.
7. Formal, final, or implemented legal opinions and determinations, as well as policies, concerning whether information related to matters that fall within the scope of the Intelligence Department’s mission qualifies as “foreign intelligence” or “foreign intelligence information” for the purposes of the Foreign Intelligence Surveillance Act or Executive Order 12333.
8. Formal, final, or implemented legal opinions and determinations, policies, procedures, training materials, or instructions that concern the Intelligence Department’s ability to request pretextual stops (potentially also known as

“whisper” or “wall”/“wall-off”/“walled-off” stops) of persons or vessels, or other forms of “parallel construction” or “parallel reconstruction.”¹

9. Any reports or other conclusions of relevant Inspectors General concerning activities of the nature described in (1)-(8) above.

Please note that where Executive Order 12333 is concerned, we request policies and procedures only insofar as they remain in effect as of the date of this request. Where new policies or procedures are adopted following this request but prior to disclosure, we also request the policies and procedures that are in effect as of the date of disclosure.

For the purposes of this request, the term “immigration” should be understood to encompass, *inter alia*, relevant activities of refugees and asylum-seekers, as well as documented or undocumented immigrants or would-be immigrants.

II. Background

a. *Section 702 of the FISA Amendments Act*

In 2005, the *New York Times* reported that the US executive branch had been monitoring the international telephone and Internet communications of people in the United States, based on an executive order and without obtaining judicial warrants.² Congress ultimately responded to these revelations by adopting the FISA Amendments Act (“FAA”) of 2008, which added a set of provisions to FISA.

One of these new provisions, Section 702, is now found at 50 U.S.C. § 1881a and empowers the Attorney General and the Director of National Intelligence to authorize surveillance that “target[s] persons reasonably believed to be located outside the United States,” so long as a “significant purpose” of the surveillance is to obtain “foreign intelligence information.”³ Elsewhere, FISA defines the latter term as including, among other things, information related to “the conduct of the foreign affairs of the United States.”⁴

Section 702 requires the Attorney General to adopt “targeting” and “minimization” procedures that are “reasonably designed” to provide certain protections to “United States persons.” (The latter term includes US citizens, aliens lawfully admitted for permanent residence, and certain corporations and unincorporated associations.⁵) The Foreign Intelligence Surveillance Court must review these targeting and minimization procedures

¹ See John Shiffman and Kristina Cooke, “Exclusive: U.S. directs agents to cover up program used to investigate Americans,” Reuters, Aug. 5, 2013, <http://www.reuters.com/article/us-dea-sod-idUSBRE97409R20130805>.

² James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” N.Y. TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

³ 50 U.S.C. § 1881a(a), (g)(2)(v).

⁴ 50 U.S.C. § 1801(e)(2).

⁵ 50 U.S.C. § 1801(i).

annually; however, the Court does not authorize or approve any individual surveillance targets.⁶ The Office of the Director of National Intelligence has declassified and released the 2015 minimization procedures for the NSA, FBI, Central Intelligence Agency, and National Counterterrorism Center.⁷

Following former Booz Allen Hamilton contractor Edward Snowden's disclosure of materials concerning NSA surveillance, the Privacy and Civil Liberties Oversight Board ("PCLOB") confirmed and described, in a public report whose contents are entirely unclassified, two types of surveillance activity the executive branch conducts pursuant to Section 702. Through the first of these two activities, "PRISM collection," the executive branch "sends a selector, such as an email address, to a United States-based electronic communications service provider"; the provider is then "compelled to give the communications sent to or from that selector to the government."⁸

Through the second Section 702 surveillance activity described by PCLOB, "upstream collection," the government compels communications companies to search the telephone and Internet communications that flow over certain basic pieces of communications infrastructure (including the circuits that are known as the "Internet backbone").⁹

After the NSA or FBI has acquired data through Section 702 surveillance, these agencies have the ability to "query" (i.e., search) the data in a manner that is similar to searches an Internet user conducts using a search engine, including by using terms such as "a key word or phrase."¹⁰ Although individuals may only view unminimized data acquired through Section 702 surveillance if the government has authorized them to do so, the relevant PCLOB report and other documents indicate that individuals without such authorization may nevertheless query databases that contain Section 702 data, and that these databases will indicate (in response to the query) that such data exists.¹¹ The individual conducting the search may then ask someone with the appropriate authorization to reveal the Section 702 data itself.¹² Applicable policies that have been declassified permit elements of the Intelligence Community to query Section 702 data using identifiers associated with United States persons under some circumstances.¹³

⁶50 U.S.C. § 1881(a), (i).

⁷ See Office of the Director of National Intelligence, "Release of 2015 Section 702 Minimization Procedures," *IC on the Record*, Aug. 11, 2016,

<https://icontherecord.tumblr.com/post/148797010498/release-of-2015-section-702-minimization>.

⁸ Privacy and Civil Liberties Oversight Board, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014), p. 7 (hereinafter "PCLOB Report").

⁹ *Id.* at pp. 35-37.

¹⁰ *Id.* at p. 55.

¹¹ *Id.* at pp. 55-56.

¹² *Id.*; Memorandum Opinion and Order, Foreign Intelligence Surveillance Court, Nov. 6, 2015, pp. 28-29 (hereinafter "FISC Opinion"). This opinion has been declassified and released; see Office of the Director of National Intelligence, "Release of Three Opinions Issued by the Foreign Intelligence Surveillance Court," *IC on the Record*, Apr. 19, 2016,

<https://icontherecord.tumblr.com/post/143070924983/release-of-three-opinions-issued-by-the-foreign>.

¹³ PCLOB Report, *supra* n. 8, pp. 56-59; FISC Opinion, *supra* n. 12, pp. 26-27.

Where the dissemination of US domestic communications acquired through Section 702 surveillance is concerned, the NSA’s minimization procedures allow the Agency to share with “appropriate Federal law enforcement authorities” any such communication that “is reasonably believed to contain evidence of a crime that has been, is being, or is about to be committed.”¹⁴ Meanwhile, the FBI’s minimization procedures generally grant the Bureau broad powers to disseminate “information that is assessed to be evidence of a crime.”¹⁵

Section 702, along with other provisions of Title VII of the FAA, is scheduled to expire on December 31, 2017 unless Congress renews it.¹⁶

b. Executive Order 12333

Originally issued in 1981, EO 12333 governs United States intelligence activities and was most recently amended in 2008.¹⁷ It provides, *inter alia*, that the US Intelligence Community must “collect information concerning, and conduct activities to protect against … international criminal drug activities.”¹⁸ The order also authorizes the Intelligence Community to collect, retain, and disseminate “[i]nformation obtained in the course of a lawful foreign intelligence” or “international drug” investigation, as well as “[i]ncidentally obtained information that may indicate involvement in activities that may violate Federal, state, local, or foreign laws.”¹⁹

On January 12, 2017, the Office of the Director of National Intelligence publicly released procedures permitting the NSA to disseminate raw signals intelligence obtained pursuant to EO 12333—including communications of US persons—to other Intelligence Community elements in some circumstances.²⁰

III. Request for expedited processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 32 C.F.R. § 286.8(e)(i)(B), HRW seeks expedited processing of this request.

¹⁴ “Minimization Procedures Used by the National Security Agency in Connection With Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended,” July 10, 2015, p. 12, available at https://www.dni.gov/files/documents/2015NSAMinimizationProcedures_Redacted.pdf.

¹⁵ “Minimization Procedures Used by the Federal Bureau of Investigation in Connection With Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, as Amended,” July 10, 2015, pp. 9, 20, 30-32.

¹⁶ FISA Amendments Act Reauthorization Act of 2012 (P.L. 112-238), § 2.

¹⁷ Executive Order 12333: United States Intelligence Activities (as amended by Executive Orders 13284, 13355, and 13470), available at <http://fas.org/irp/offdocs/eo/eo-12333-2008.pdf> (hereinafter “EO 12333”).

¹⁸ *Id.* at § 1.4(b).

¹⁹ *Id.* at § 2.3(c) and (i).

²⁰ “Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency under Section 2.3 of Executive Order 12333 (Raw SIGINT Availability Procedures),” undated, available at <https://www.dni.gov/files/documents/icotr/RawSIGINTGuidelines-as-approved-redacted.pdf>.

There is a “compelling need” for the information we have requested, as HRW is “primarily engaged in disseminating information” and there is an urgent need for the organization to “inform the public concerning actual or alleged Federal Government activity” in the area of surveillance practices (5 U.S.C. § 552(a)(6)(E)(v)(ii); 32 C.F.R. § 286.48(e)(i)(B)).

a. Human Rights Watch is primarily engaged in disseminating information

Human Rights Watch is a nonprofit organization comprised of human rights professionals who engage in extensive fact-finding and reporting on human rights conditions in the United States and elsewhere, providing original factual information and analyses to the US and global public and to media outlets. Where the practices of the United States’ Federal and state governments are concerned, for example, HRW has investigated and reported on interrogation techniques allegedly used by the Central Intelligence Agency, the impact of US surveillance on journalists and attorneys, and deportations for drug offenses.²¹

HRW’s fact-finding work regularly forms the basis of reports by print, broadcast, and Internet media.²² The organization also disseminates original reports and other factual content to the public, including through its website, www.hrw.org, which receives approximately 15 million unique visitors per year.

HRW therefore meets the statutory definition of a “representative of the news media” as an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). The Department of Homeland Security recognized HRW as a representative of the news media when responding to a Freedom of Information Act request in 2008 (reference number DHS/OS/PRIV 08-832 PoKempner request).

b. There is an urgent need to inform the public concerning actual or alleged Federal Government surveillance activity

²¹ Laura Pitter, “US: Ex-Detainees Describe Unreported CIA Torture,” Oct. 3, 2016, <https://www.hrw.org/news/2016/10/03/us-ex-detainees-describe-unreported-cia-torture>; Human Rights Watch, WITH LIBERTY TO MONITOR ALL (2014), available at <https://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and>; Human Rights Watch, A PRICE TOO HIGH (2015), available at <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses>.

²² For recent examples, see Spencer Ackerman, “Tunisian men detail CIA black site torture involving electric chair and more,” GUARDIAN, Oct. 3, 2016, <https://www.theguardian.com/us-news/2016/oct/03/cia-torture-electric-chair-black-site>; Megan Jula & Julia Preston, “Delayed Care Faulted in Immigrants’ Deaths at Detention Centers,” N.Y. TIMES, July 7, 2016, p. A13, available at <http://www.nytimes.com/2016/07/08/us/delayed-care-faulted-in-immigrants-deaths-at-detention-centers.html>; Christopher Ingraham, “Police arrest more people for marijuana use than for all violent crimes – combined,” WASH. POST, Oct. 12, 2016, <https://www.washingtonpost.com/news/wonk/wp/2016/10/12/police-arrest-more-people-for-marijuana-use-than-for-all-violent-crimes-combined/>.

As noted above, Section 702 of FISA is scheduled to expire on December 31, 2017, unless Congress renews it. Particularly following the Snowden disclosures that began in June 2013, there has been intense media and public interest, as well as reporting by government-appointed panels, concerning programs conducted under this authority.²³ Multiple books have been published, and feature-length films created, that address Section 702 and/or other US government surveillance topics.²⁴ In May 2015, the United States Senate held a public hearing concerning the FAA (which includes Section 702), and two legislative amendments have previously been introduced in the House of Representatives with the intention of restricting the querying of Section 702 data.²⁵ This interest in actual or alleged federal government activities conducted pursuant to Section 702 is likely to intensify as the legislation's sunset deadline approaches and Congress is forced to decide whether to re-authorize this controversial provision. The public therefore urgently requires the information Human Rights Watch is seeking regarding the federal government's interpretation of Section 702 (and related policies and procedures) and its treatment of data acquired under this legal authority.

EO 12333 also continues to be the subject of public controversy and debate. Documents disclosed by Snowden that allegedly describe programs the United States operates pursuant to this Executive Order have been the subject of extensive media reporting.²⁶ Additionally, whistleblower John Napier Tye has repeatedly raised public concerns about

²³ See, e.g., PCLOB Report, *supra* n. 8; President's Review Group on Intelligence and Communications Technologies, LIBERTY AND SECURITY IN A CHANGING WORLD (2013), available at https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; Timothy B. Lee, "Here's everything we know about PRISM to date," WASH. POST, June 12, 2013, <https://www.washingtonpost.com/news/wonk/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/>; Charlie Savage, "F.B.I. Is Broadening Surveillance Role, Report Shows," N.Y. TIMES, Jan. 11, 2015, p. A10, available at <http://www.nytimes.com/2015/01/12/us/politics/beyond-nsa-fbi-is-assuming-a-larger-surveillance-role-report-shows.html>; Mark Hosenball & Dustin Volz, "Yahoo email scan fell under foreign spy law – sources," REUTERS, Oct. 6, 2016, <http://www.reuters.com/article/us-yahoo-nsa-idUSKCN1252NR>.

²⁴ See, e.g., Charlie Savage, POWER WARS (2015); Glenn Greenwald, NO PLACE TO HIDE (2014); PBS Frontline, UNITED STATES OF SECRETS (two-part broadcast series, dir. Michael Kirk) (2014).

²⁵ A video recording of the hearing is available at <https://www.c-span.org/video/?409335-1/senate-judiciary-committee-holds-hearing-fisa-reauthorization>. Regarding the legislative amendments, see Office of Representative Zoe Lofgren, "House to Vote on Amendment to Shut Surveillance Backdoors" (press release), June 15, 2016, <https://lofgren.house.gov/news/documentsingle.aspx?DocumentID=398078>.

²⁶ See, e.g., Barton Gellman & Ashkan Soltani, "NSA surveillance program reaches 'into the past' to retrieve, replay phone calls," WASH. POST, Mar. 18, 2014, https://www.washingtonpost.com/world/national-security/nsa-surveillance-program-reaches-into-the-past-to-retrieve-replay-phone-calls/2014/03/18/226d2646-ade9-11e3-a49e-76adc9210f19_story.html; James Ball, "NSA collects millions of text messages daily in 'untargeted' global sweep," GUARDIAN, Jan. 16, 2014, <https://www.theguardian.com/world/2014/jan/16/nsa-collects-millions-text-messages-daily-untargeted-global-sweep>; Barton Gellman & Ashkan Soltani, "NSA infiltrates links to Yahoo, Google data centers worldwide, Snowden documents say," WASH. POST, Oct. 30, 2013, https://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html.

the federal government's use of this authority in media outlets.²⁷ As mentioned above, on January 12, 2017, the government publicly released procedures concerning the NSA's dissemination of data obtained through EO 12333 to other US intelligence agencies; these procedures led to an expression of concern by the American Civil Liberties Union.²⁸

The publicly available procedures concerning Section 702 and EO 12333 explicitly contemplate the acquisition and dissemination of US persons' communications and related data, as well as attorney-client communications.²⁹ As explained above, EO 12333 also expressly authorizes the Intelligence Community (of which the Intelligence Department is a member) to collect signals intelligence as part of an "international drug" investigation or "foreign intelligence" investigation, while the PCLOB report on Section 702 and other publicly available government materials confirm that Section 702 data may be queried or disseminated in connection with criminal inquiries. Additionally, documents previously released by the Drug Enforcement Administration acknowledge the practice of using "parallel construction" or "parallel reconstruction" to prevent the disclosure of Intelligence Community sources and methods in court.³⁰ The requests we have made are therefore of a type that concern actual or alleged Federal government activity.

Thus, there is an urgent need for the public to be as fully informed as possible concerning the government's activities pursuant to these two major surveillance authorities.

I, Dinah PoKempner, certify that this demonstration of compelling need is true and correct to the best of my knowledge and belief.

IV. Request for public interest fee waiver

HRW requests that the Intelligence Department search for, review, duplicate, and furnish any documents responsive to this submission without charge, as the "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester" (5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 286.12(l)). HRW is a non-profit organization and has no commercial interest in

²⁷ John Napier Tye, "Meet Executive Order 12333: The Reagan rule that lets the NSA spy on Americans," WASH. POST, July 18, 2014, https://www.washingtonpost.com/opinions/meet-executive-order-12333-the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2_story.html; John Napier Tye, "We Can't Trust Trump With Today's NSA," SLATE, Nov. 2, 2016, http://www.slate.com/articles/technology/future_tense/2016/11/we_can_t_trust_trump_with_today_s_nsa.html.

²⁸ Charlie Savage, "N.S.A. Gets More Latitude to Share Intercepted Communications," N.Y. TIMES, Jan. 12, 2017, p. A11, available at https://www.nytimes.com/2017/01/12/us/politics/nsa-gets-more-latitude-to-share-intercepted-communications.html?_r=0.

²⁹ See *supra* nn. 14-15, 20.

³⁰ See Muckrock, "DEA teaches agents to recreate evidence chain to hide methods," Feb. 3, 2014, available at <https://www.muckrock.com/news/archives/2014/feb/03/dea-parallel-construction-guides/>, and associated documents available at <http://www.documentcloud.org/documents/1011382-responsive-documents.html#document/p9>.

the Intelligence Department’s response to this request for documents. Additionally, this request exhibits each of the relevant factors set forth at 32 C.F.R. § 286.12(l): (1) it concerns the “operations or activities” of the Intelligence Department, (2) the disclosure of the records sought would be meaningfully informative about these operations or activities, and (3) the disclosure would contribute significantly to the general public’s understanding of the subject in question.

a. The request concerns Intelligence Department operations or activities

HRW’s request concerns documents pertaining to federal government surveillance activities conducted pursuant to two specific legal authorities: Section 702 of FISA and EO 12333. These authorities explicitly authorize or otherwise contemplate the government’s use of surveillance in the circumstances described therein. EO 12333, in particular, describes and anticipates the surveillance role of the intelligence elements of the Marine Corps.³¹

b. The disclosure of the records sought would be meaningfully informative about these operations or activities

Through this request, HRW seeks legal analyses, policies, procedures, and training materials. Just as such foundational rules or guidance would presumably be intended to provide meaningful information about the activities in question to Intelligence Department personnel, it would equally provide meaningful information to the public about the nature and processes of these activities as well as applicable limits and safeguards.

c. The disclosure would contribute significantly to the general public’s understanding of the subject in question

As described above, the US’ surveillance practices have generated prolonged and widespread interest on the part of the public, particularly following Snowden’s disclosure of materials in 2013.

The disclosures HRW seeks concern foundational legal interpretations, policies, rules, guidance, and instructions that (insofar as they exist) presumably establish the parameters and operations of, as well as safeguards applying to, the relevant US surveillance programs. The disclosure of such foundational materials would enable the public to ascertain the extent and nature of the Intelligence Department’s relationship with these surveillance activities—a matter regarding which the public currently possesses little, if any, unambiguous and detailed information.

As noted above, HRW disseminates information widely to other members of the media and to the general public; information disclosed in response to this request would therefore contribute significantly to the public’s understanding of the matter in question.

³¹ EO 12333, *supra* n. 17, § 1.7(f).

V. Request for news media fee status

HRW also requests an exemption from or waiver of other fees that might otherwise apply as a member of the news media (5 U.S.C. § 552(a)(4)(A)(ii)(II)-(III); 32 C.F.R. § 286.12(e)); see Part III(a) above for an explanation of our status as a representative of the news media.

* * *

Responses should be addressed to:

ATTN: Dinah PoKempner
General Counsel
Human Rights Watch
350 Fifth Ave., 34th Fl.
New York, NY 10018

The addressee may also be contacted by e-mail at pokempd@hrw.org or by telephone at (212) 290-4700.

Sincerely,



Dinah PoKempner
General Counsel

